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No. 90-400

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

PETE LE'MON, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that a union had not acted arbitrarily, in violation of its duty of fair representation, by failing to give timely notice of a labor dispute to mediation authorities before calling a strike and by encouraging employees to continue the strike after they had been discharged because of the tardy strike notice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 902 F.2d 810. The decision and order of the National Labor Relations Board (Pet. App. 14a-22a), including the decision of the administrative law judge (Pet. App. 23a-41a), are reported at 291 N.L.R.B. No. 41.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 7, 1990. On August 6, 1990, Justice White granted an extension of time within which to file a petition for certiorari to and including September 5, 1990. The petition was filed

on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed at the Albuquerque, New Mexico manufacturing plant of Aztech International, Ltd. ("the Company"). The Company's employees were represented by the Sheet Metal Workers' International Union No. 49, AFL-CIO ("the Union"), and were covered by a collective bargaining agreement effective until September 30, 1985. Pet. App. 5a, 25a. In Spring 1985, the Union initiated negotiations for a new agreement. Thereafter, the employees voted to authorize the Union to call a strike should negotiations fail. On September 30, Union Business Agents Gary Briggs and George Gilliland met with the employees to discuss the Company's final contract offer. Briggs expressed the view that the offer was inadequate. He told the employees that their only options were to accept the contract or to strike, and he explained that a strike entailed the risk that they would be replaced or fired. Pet. App. 27a-28a. On October 1, the employees went on strike, and established a picket line at the Company's premises. Pet. App. 28a.

On the day the strike began, Company President Bennett King hand-delivered or mailed to each of the strikers a letter stating that the strike was illegal because the Union had failed to give proper notice of a labor dispute to the Federal Mediation and Conciliation Service (FMCS);[1] therefore, the letter stated,

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[1] Section 8(d)(3) of the Act, 29 U.S.C. 158(d)(3) (Pet. App. 50a), requires a party seeking termination or modification of collective agreement to give the FMCS notice at least 30 days before the expiration of the contract. Section 8(d)(4), 29 U.S.C. 158(d)(4), precludes a strike within 60

the National Labor Relations Act ("the Act") did not protect the strikers from discharge, and the strikers were discharged effective immediately. The letter added that strikers who wished to return to work would have to fill out applications to be hired as new employees. Pet. App. 28a-29a.

When several strikers asked Briggs and Gilliland about the Company's discharge letter, they responded that it was a "ploy" and "rhetoric." The Union agents advised the employees to "stick together." Briggs added that, regardless of the legality of the strike, the strikers could prevail if they could put enough pressure on the Company. Pet. Ap. 15a, 29a-30a.[2] On October 5, an article in a local paper reported that the Board's Regional Office had issued an unfair labor practice complaint based on the Company's charge that the notice was untimely. The article quoted a Board official's assertions that the picketing was unlawful. Pet. App. 29a. After publication of the ar-

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days of the requisite notice (Pet. App. 50a). Section 8(d) further provides that "[a]ny employee who engages in a strike within * * * [the 60 day] period * * * shall lose his status as an employee of the [struck] employer * * * for purposes of [the Act]." Pet. App. 51a.

[2] Neither Briggs nor Gilliland was aware that the Section 8 (d) (3) notice was late. Pet. App. 25a-26a. The Union's attorney, Gerald Bloomfield, had in fact mailed untimely notice to the FMCS on September 11, and the FMCS received it on September 17, 13 days before the contract was to expire. Briggs attempted several times to reach Union Attorney Bloomfield to ask about the notice, but Bloomfield was out of town. Briggs spoke with another attorney in Bloomfield's office but was unable to learn the date or circumstances of the filing. Pet. App. 29a-30a. Briggs and Gilliland thought the Company's contention that timely notice of the strike had not been given was erroneous. Pet. App. 15a, 29a-30a.

ticle, Briggs and Gilliland continued to tell strikers that the discharges were a company tactic and that the strikers should "stick together" and try to win the strike. Pet. App. 29a.

By October 7, most of the strikers had abandoned the strike. Briggs then told the remaining strikers that the strike had been lost and that they should try to go back to work. Pet. App. 30a. Some strikers who had not been replaced were rehired immediately by the Company; others were rehired subsequently. All of the strikers who were rehired came back as new employees. Pet. App. 30a.

Employees subsequently filed a petition with the Board's Regional Office seeking an election to decertify the Union as their collective bargaining representative. When the Union received the petition, it disclaimed interest in representing the employees. Pet. App. 30a-31a.

2. Based on petitioner's charge, the Board's Regional Office issued a complaint alleging that the Union breached its duty of fair representation under Section 8(b)(1)(A) of the Act, 29 U.S.C. 158(b)(1)(A), by its conduct respecting the strike. Pet. App. 23a-24a. The Board (Chairman Stephens dissenting in part), in agreement with the administrative law judge, dismissed the complaint. Pet. App. 14a-15a.

The Board explained that, while the Union's representation here "may not meet the standards of competence and caution that the Board would like to see observed[,] * * * [a] breach of duty of fair representation occurs only when the representative's conduct is 'arbitrary, discriminatory, or in bad faith.'" Pet. App. 17a (citing *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967)). Applying that standard, the Board

unanimously agreed with the ALJ that the Union's failure accurately to coordinate the strike with the required notice-filing was "no more than mere negligence," and therefore did not violate the duty of fair representation. Pet. App. 15a.[3]

The Board majority also found that the Union's conduct after October 2 "was not so lacking of a rational or logical basis as to be arbitrary." Pet. App. 16a. The Board explained that the Union agents thought that job loss was a risk in any strike, and that tactically the employees' "best protection" was to continue the strike even if the notice was deficient. Moreover, "even if the agents had understood that the strikers lost status as employees of the [Company] by operation of statute or had in fact been permanently discharged * * *, there was little they could do to benefit the employees at that point." Pet. App. 17a. Since the employees had to apply for jobs as new employees, the Board concluded that "[i]t was not unreasonable for the agents to assume that collective action in seeking reemployment would be more effective than individual action."[4] *Ibid.*

3. The court of appeals agreed with the Board that the Union had not breached its duty of fair repre-

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[3] The Board assumed, arguendo, "that a union that takes action in 'reckless disregard' of its statutory duties to unit employees violates its duty of fair representation." Pet. App. 17a n.5.

[4] Chairman Stephens would have found "that the Union's business agents * * * behaved in a manner that went beyond mere negligence to reckless disregard of the harm to the employees through actions that they took after they were put on notice [as of October 2] of the clear possibility that the strike notice had not been timely given and that the [Company] was taking action against the employees because of this." Pet. App. 20a.

sentation. However, the court did not pass on the Board's conclusion that the Union conduct was not arbitrary within the meaning of *Vaca* v. *Sipes*. Rather, it held that the duty of fair representation is not implicated when "the injury suffered is common to the majority of represented employees." Pet. App. 13a. The court explained that, "[a]s the duty-of-fair representation doctrine has evolved, its function as the protector of minority and individual employee rights, whether in collective bargaining or in the handling of grievances, has been emphasized consistently." Pet. App. 9a. Since "the injured party here is not an individual or group singled out for treatment different from that accorded the majority, but the entire class of [Company] employees represented by the Union," the court concluded that the employees, "by virtue of their majority status," had available to them the "powerful remedy of ouster"—which they used—and thus did not need the protection afforded by the duty of fair representation. Pet. App. 10a-11a.

ARGUMENT

Petitioner contends (Pet. i, 11-12, 19-20) that it was a *per se* breach of the duty of fair representation for the Union not to fulfill its statutory duty timely to file the Section 8(d) notice with the FMCS and to fail to inform the employees of that default and of its consequences prior to their decision to strike.[5] We believe that the Board properly applied

[5] Petitioner also contends (Pet. i) that it was a *per se* violation of the Union's duty of fair representation not to advise the employees of its failure to file timely notices and the consequences of that inaction *before* the employees voted to reject the Company's contract proposal and commence a strike. Since, at that point, the Union did not know that the notices

the standard established in *Vaca* v. *Sipes*, as elaborated in *United Steelworkers of America* v. *Rawson*, 110 S. Ct. 1904, 1911 (1990), to conclude that conduct by a union attributable to mere negligence—regardless of whether it violated a "mandatory" duty—is not "arbitrary" conduct that would constitute a breach of the duty of fair representation. The Board was also correct in deciding that, on the facts of this particular case, the union's conduct both before and after the strike was fairly attributed to mere negligence. Since the Board's rationale fully supports the judgment below, we believe that further review is not warranted.

The Court may wish, however, to hold this case pending the Court's review of the Fifth Circuit's decision in *O'Neill* v. *Air Line Pilots Ass'n, Int'l*, 886 F.2d 1438 (1989), cert. granted, No. 89-1493 (Oct. 1, 1990). The Tenth Circuit in the present case upheld the Board's decision on the theory that the duty of fair representation, as articulated in *Vaca* and other decisions, is not applicable to union conduct that, even if arbitrary, uniformly affects the majority of the bargaining unit. *O'Neill* raises the issues, in the contract negotiation context, of whether the *Vaca* standard is applicable and of what criteria are appropriate for determining whether the duty of fair representation has been breached. Although *O'Neill* does not directly address the rationale

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had not been timely filed, petitioner's additional contention adds nothing to his first contention that the Union's negligence, with its serious consequences, breached the duty of fair representation. By contrast, Chairman Stephens, dissenting in part from the Board's decision, would have found the Union's conduct arbitrary only after October 2, 1985, when it was on notice of the possible consequences of the failure to file timely notice with the FMCS. Pet. App. 19a.

adopted by the Tenth Circuit in this case, *O'Neill* does present the Court with an opportunity to consider the standards by which claims under the "arbitrariness" prong of *Vaca* are to be judged. Thus, the *O'Neill* decision may well shed light on the validity of the court of appeals' rationale in this case.

1. Petitioner does not dispute (Pet. 9-10) the application here of the *Vaca* three-part standard for determining whether a union has breached its duty of fair representation—*i.e.*, whether the union's "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190. Rather, petitioner contends (Pet. i, 19-20) that a union's failure to perform a mandatory statutory obligation with deleterious consequences for unit employees should be deemed arbitrary *per se*. In advancing this contention, petitioner does not dispute the Board's finding that the union's unfortunate conduct in this case was due to mere negligence; he claims instead that the particular type of negligent conduct at issue in this case ought to be treated as arbitrary *per se*, and thus a breach of the union's duty of fair representation.

In *United Steelworkers of America* v. *Rawson*, 110 S. Ct. 1904, 1913 (1990), the Court held that an "allegation of mere negligence will not state a claim for violation of [the duty of fair representation]." [6] Nothing in *Rawson* suggests that any distinction should be drawn between a union's negligence in failing to perform a so-called mandatory duty (as alleged in this case) and its negligent failure to per-

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[6] *Rawson* was decided on May 14, 1990, one week after the Tenth Circuit's decision in this case. The Tenth Circuit therefore did not have the benefit of the *Rawson* decision in evaluating the Board's "mere negligence" rationale.

form other obligations (such as the contractual obligation at issue in *Rawson*). As the facts here show, in the former case as well as in the latter, the union's failure may be the result of simple negligence that is not properly characterized as arbitrary.

Petitioner's reliance on *Teamsters Warehouse Union, Local 860*, 236 N.L.R.B. 844 (1978), enforced, 652 F.2d 1022 (D.C. Cir. 1981) (Pet. 11-14), is misplaced. That case did not involve any claim of negligent failure to perform a statutorily mandated act. In *Teamsters*, the union knew, but did not inform the unit employees, that their employer would discharge them if their contractual wage demand was successful. The Board found that the union violated its duty of fair representation "by persisting in demanding a wage increase it knew would result in [the employees'] termination." 236 N.L.R.B. at 844 n.2. In the present case, the Union agents did not know that the notice to the mediation service had not been timely filed, nor did they know of the consequences of that omission at the time the strike decision was made. However, they did inform the employees that their jobs were at risk if they struck. Moreover, the Board majority concluded that, after they were apprised of the notice problem, the Union agents did not act irrationally in advising the employees to persevere with the strike, since the Company had already discharged them.[7]

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[7] In a pre-*Rawson* decision, the Ninth Circuit held that negligence may constitute a breach of the duty of fair representation where (1) "the individual interest at stake is strong *and* the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim," and (2) "union negligence [is] the solitary and indivisible cause of the complete extinguishment of an employee's grievance

2. Although we submit that the Board's decision was correct, the Court may decide that, in light of the divergence between the Board's rationale and that adopted by the court of appeals, this case should be held for the decision in *O'Neill*. As we pointed out in our brief at the petition stage in *O'Neill* (at 9-11), there is considerable disarray in the courts of appeals concerning the scope of the duty of fair representation. With regard to the question in this case, for example, the Sixth Circuit shares the view of the Tenth Circuit that the duty of fair representation applies only where "a member or group [is] singled out for different treatment." *NLRB* v. *Local 299, Int'l Bhd. of Teamsters*, 782 F.2d 46, 51 (1986) (Pet. App. 12a). The D.C. Circuit, on the other hand, agrees with the Board that arbitrary action directed at an entire unit may constitute a breach of the duty. *Warehouse Union, Local 860* v. *NLRB*, 652 F.2d 1022, 1025 (D.C. Cir. 1981); and see *Alicea* v. *Suffield Poultry*, 902 F.2d 125, 130 (1st Cir. 1990) (differential treatment not necessary for breach of the duty of fair representation).

Although *O'Neill* does not directly raise the question whether the Tenth Circuit's rationale in this case is correct, it does offer the Court an opportunity to consider the scope of conduct that violates the duty of fair representation because it is "arbi-

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rights." *Eichelberger* v. *NLRB*, 765 F.2d 851, 855 (1985). But, even in those circumstances, the Ninth Circuit recognized that "courts and administrative bodies are not constrained to find a breach, but must carefully weigh the circumstances of each particular case in light of established principles of law." *Ibid.* (explaining *Dutrisac* v. *Caterpillar Tractor Co.*, 749 F.2d 1270 (9th Cir. 1983)). See also *Peterson* v. *Kennedy*, 771 F.2d 1244, 1254 (9th Cir. 1985).

trary."[8] Thus, the Court's decision in *O'Neill* may well shed light on the rationale of the decision below —that a union's coduct is not "arbitrary" within the meaning of *Vaca* unless it adversely affects only a minority of employees. Accordingly, the Court may wish to defer action on this petition until *O'Neill* has been decided.

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[8] The Court's recent cases concerning the duty of fair representation have generally involved procedural or other issues that do not directly implicate the standard of conduct imposed by the duty. See, *e.g., Chauffeurs, Local No. 391* v. *Terry,* 110 S. Ct. 1339 (1990) (right to jury trial in duty of fair representation case) ; *United Steelworkers of America* v. *Rawson, supra* (pre-emption of state law by duty of fair representation) ; *Breininger* v. *Sheet Metal Workers Int'l Ass'n,* 110 S. Ct. 424, 429-438 (1989) (relationship between unfair labor practice claims and duty of fair representation claim) ; *Communications Workers* v. *Beck,* 487 U.S. 735 (1988) (permissibility of expenditure of union dues for non-representational activities in light of 29 U.S.C. 158(a) (3) ; *DelCostello* v. *International Brotherhood of Teamsters,* 462 U.S. 151 (1983) (statute of limitations) ; *IBEW* v. *Foust,* 442 U.S. 42 (1979) (availability of punitive damages) ; *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976) (whether suit against employer may be dismissed when corresponding duty of fair representation claim against union has withstood motion for summary judgment). Although the court has necessarily had to consider issues concerning the scope of the duty of fair representation in the course of deciding many of the above cases, the cases have not directly focused on the requisite standard of conduct.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held in abeyance and disposed of in light of the Court's decision in *Air Line Pilots Association International* v. *O'Neill*, No. 89-1493.[9]

Respectfully submitted.

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NOVEMBER 1990

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[9] If the Court ultimately decides to remand the case to the Tenth Circuit in light of the decision in *O'Neill*, we suggest that the Tenth Circuit also be directed to consider the effect of this Court's decision in *United Steelworkers of America* v. *Rawson*, *supra*.

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